

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2017] FCAFC 195

Appeal from: Application for extension of time and leave to appeal:
Singh v Minister for Immigration and Border Protection
[2017] FCCA 1109

File number(s): NSD 994 of 2017

Judge(s): **PERRAM, FARRELL AND PERRY JJ**

Date of judgment: 29 November 2017

Catchwords: **MIGRATION** – where the Administrative Appeals Tribunal affirmed decision to refuse to grant the appellant a student visa under Public Interest Criterion 4020(1) (bogus document) – whether Tribunal failed to consider claim for waiver of PIC 4020(1)

Legislation: *Migration Regulations 1994* (Cth) Schedule 2 clause 572.224, Schedule 4
Federal Court Rules 2011 (Cth) r 36.03

Cases cited: *Aurora v Minister for Immigration and Border Protection* [2016] FCAFC 35; (2016) 238 FCR 153
BAO15 v Minister for Immigration and Border Protection [2016] FCA 214 at [19]
CTV15 v Minister for Immigration and Border Protection [2017] FCA 976 at [12]
Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344 at 348–349
MZABP v Minister for Immigration and Border Protection [2015] FCA 1391
MZABP v Minister for Immigration and Border Protection [2016] FCAFC 110
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263; (2004) 144 FCR 1

Date of hearing: 13 November 2017

Registry: New South Wales

Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	33
Counsel for the Appellant:	Mr D Hughes SC and Mr T Liu
Solicitor for the Appellant:	D'Ambra Murphy Lawyers
Counsel for the First Respondent:	Ms R Francois
Solicitor for the First Respondent:	Sparke Helmore

ORDERS

NSD 994 of 2017

BETWEEN: **DAVINDER SINGH**
Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**
First Respondent

ADMINISTRATIVE APPEAL TRIBUNAL
Second Respondent

JUDGE: **PERRAM, FARRELL AND PERRY JJ**

DATE OF ORDER: **29 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. The application for an extension of time be allowed with respect to grounds 1 and 2 of the draft amended notice of appeal.
2. The amended notice of appeal from the Federal Circuit Court annexed to the affidavit of the appellant sworn on 22 June 2017 is taken as filed.
3. The appeal be dismissed.
4. The appellant is to pay the costs of the first respondent as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. INTRODUCTION

1 The appellant seeks an extension of time within which to file an amended notice of appeal. Argument was heard on that application together with the appeal in the event that leave to appeal was granted.

2 In the Court below, the appellant sought judicial review of a decision by the Administrative Appeals Tribunal (the **Tribunal**) affirming a decision of a delegate of the first respondent, the Minister for Immigration and Border Protection (the **Minister**), not to grant the appellant a Student (Temporary) (Class TU) visa (**student visa**).

3 The draft amended notice of appeal raises two grounds of appeal, ground 4 having been abandoned in written submissions before the hearing and ground 3, at the hearing. The remaining grounds can be summarised as follows:

(1) the primary judge gave inadequate reasons for judgment and in particular did not identify the findings on which the conclusions at paragraphs [15] to [18] inclusive of his judgment were made (**ground 1**);

(2) the primary judge erred in failing to hold that the Tribunal fell into jurisdictional error in failing to address the appellant's submission that Public Interest Criterion (**PIC**) 4020 in Schedule 4 to the *Migration Regulations 1994* (Cth) (the **Regulations**) should be waived because, if he was granted a visa, his Australian employer would sponsor him and benefit from his "*exceptional skills*" (**ground 2**).

4 Ground 2 is characterised by the appellant as either a failure to consider a relevant consideration or a denial of procedural fairness.

5 For the reasons set out below, an extension of time should be granted with respect to grounds 1 and 2 of the amended notice of appeal. However, the appeal should be dismissed.

2. BACKGROUND

The Delegate's decision

6 The appellant is a 29-year-old citizen of India. He applied for a student visa on 30 May 2014. On 28 June 2014 he provided documents addressing the financial capacity criteria for the

grant of a student visa, including three bank documents in the name of Mr Joginder Singh who was said to be his maternal grandfather and financial sponsor.

7 By a letter dated 23 September 2014, the Department invited the appellant to comment on information raising questions as to the genuineness of the bank documents, namely:

(3) when telephoned by the Department, the owner of the bank account had denied sponsoring anyone in the last five years and said that he did not know anyone by the appellant's name; and

(4) two inconsistencies were identified following further checks.

8 The appellant responded through his representative by email on 22 October 2014, stating relevantly that:

Due to a family dispute between the applicant's parents and other family members, his grandfather is now not willing to provide any financial support for his overseas studies. Please find attached an affidavit received for [sic] the applicant's parents explaining their situation.

9 An affidavit from the appellant's mother was attached in which she deposed that "*due to family dispute my father has withdrawn sponsorship of my son*" and requested "*one chance for sponsor by any other family member may kindly be granted to my son*".

10 The delegate refused to grant the student visa to the appellant on 28 November 2014, finding that the appellant did not satisfy cl 572.224 of Schedule 2 to the Regulations which required the appellant to satisfy, relevantly, PIC 4020. PIC 4020(1) in turn relevantly required that there be no evidence that the appellant had provided a "*bogus document*" (as defined in s 5(1) of the Act) or information that was false or misleading in a material particular in relation to the application for the visa. PIC 4020 also prevents a person who has been refused a visa on this basis from applying for any form of visa for a period of three years and therefore has consequences beyond the particular visa application. However, the requirement in PIC 4020(1) can be waived in certain circumstances under PIC 4020(4). PIC 4020 and the scheme giving effect to it were explained in detail by this Court in *Aurora v Minister for Immigration and Border Protection* [2016] FCAFC 35; (2016) 238 FCR 153.

The Tribunal's decision

11 The appellant applied to the Tribunal for review of the delegate's decision on 11 December 2014. In his written submissions dated 22 June 2016 to the Tribunal, the appellant raised for the first time a claim that his uncle had impersonated his grandfather on the telephone call

from the Department and had lied about not knowing the appellant. The appellant submitted that his uncle had done this because his uncle did not approve of the appellant's grandfather's money going to the appellant as the uncle believed that he was entitled to that money.

12 On 23 June 2016 the appellant appeared before the Tribunal to give evidence and present arguments. He stated that he did not require the assistance of an interpreter and the hearing was conducted in English. On the same day, the Tribunal affirmed the delegate's decision not to grant the appellant a student visa.

13 The Tribunal put the inconsistencies referred to in the Department's letter of 23 September 2014 to the appellant and questioned him on why the explanation given to the Tribunal about his uncle's misconduct had not been raised earlier. Further, while the appellant responded that there was a miscommunication with his agent who did not submit the financial documents from an alternative sponsor in time, the Tribunal drew to his attention that "*the issue in his case was the provision of a bogus document or information that was false or misleading in a material particular and this could not be overcome by provision of documents from an alternative sponsor*" (Tribunal reasons at [13]).

14 The Tribunal discussed with the appellant the inconsistency between the explanation he gave to the Department as to how his problems came about, namely, that his grandfather had withdrawn his sponsorship, and the explanation he gave to the Tribunal. The Tribunal found that if the latter were true, it was implausible that neither the appellant nor his mother had mentioned it before to the Department. The Tribunal was also not persuaded by the appellant's response to the Department (at [14]). The Tribunal concluded that the appellant had given or caused to be given to the Department a bogus document and information that was misleading in a material particular in respect of his visa application (at [15]). Accordingly the Tribunal found that he did not meet PIC 4020(1) (at [16]).

15 The Tribunal then considered whether the requirements of PIC 4020(1) should be waived, and referred in this context to the appellant's evidence as follows:

18. In his submission the applicant asked that 'the selfish and unjust actions of others' not be allowed to 'jeopardise his life' and he be given the opportunity to complete the final leg of his studies before returning to his country to use all his skills to make something of himself.

19. After explaining the waiver provisions to the applicant at the Tribunal hearing the Tribunal asked him whether he wished to put forward any submissions regarding the provisions. The applicant responded that he did not but said he wanted to complete a one-year Marketing course, which he had not yet started.

- 16 The Tribunal concluded that it was not satisfied that the appellant's circumstances constituted compelling circumstances within PIC 4020(4) and therefore that the requirements of PIC 4020(1) should be waived (Tribunal reasons at [20]).

The decision of the Federal Circuit Court

- 17 The appellant was unrepresented in the Court below. On 25 May 2017, the Federal Circuit Court dismissed the application for judicial review with costs, giving *ex tempore* (oral) reasons for decision. Written reasons were published on 28 June 2017.
- 18 Relevantly, ground 4 of the application for judicial review is said to encompass ground 2 of the notice of appeal. The primary judge considered ground 4 together with grounds 1 to 3. The primary judge rejected those grounds on the basis that they repeated the appellant's evidence before the Tribunal on the question of whether his financial documentation was bogus and as such took issue impermissibly with the merits of the Tribunal's decision (reasons below at [15]). Ground 4 also asserted at a high degree of generality that the Tribunal "*did not take my circumstances into consideration and just refused my application.*" The primary judge held that this assertion was not in fact borne out by the Tribunal's approach, with the Tribunal's reasons revealing that it took into account the appellant's circumstances in determining whether or not the criterion should be waived (reasons below at [15]).

3. SHOULD LEAVE TO APPEAL BE GRANTED?

- 19 Leave to appeal is necessary because the application was filed outside the 21 day period within which to appeal stipulated by r 36.03(a)(i) of the *Federal Court Rules 2011* (Cth) (FCR) and no alternative date had been fixed for that purpose by the Court below, as envisaged by FCR r 36.03(b).
- 20 The principles relevant to the exercise of discretion to grant an extension of time for an appeal are well established and are underpinned by a consideration of where the best interests of justice lie. Those principles may be summarised as follows.
- (5) An extension of time will not be granted unless the Court is positively satisfied that it is proper to do so.
 - (6) The length of the delay is a relevant factor.

- (7) The appellant must show an acceptable explanation for the delay and that it is fair and equitable in the circumstances to extend time.
- (8) Any prejudice to the respondent is a material factor militating against the grant of an extension, although the absence of prejudice does not, without more, suffice to justify the grant of an extension of time.
- (9) The merits of the substantive appeal, if leave were granted, are properly to be taken into account.

(See e.g. *BAO15 v Minister for Immigration and Border Protection* [2016] FCA 214 at [19]; *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348–349.)

- 21 As to the fifth of these matters, the proposed grounds should be considered on their face and examined at a “*reasonably impressionistic level*”; the Court should not descend into a fuller consideration of the arguments for and against each ground (see *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391 at [62] (Mortimer J) (approved on appeal in *MZABP v Minister for Immigration and Border Protection* [2016] FCAFC 110 at [38])).
- 22 In support of his application for an extension of time filed on 22 June 2017, the appellant relied upon his affidavit affirmed on the same date. The appellant sought an extension of time on the ground that he had not been provided with a copy of the “*detailed judgment*” at the time of filing his application for an extension of time and therefore could not draft “*detailed and correct grounds of appeal*”. The reference to the “*detailed judgment*” is plainly a reference to written reasons for the decision.
- 23 In our view, it is fair and equitable to grant the extension of time within which to appeal.
- 24 First, as the first respondent accepts, the delay of seven days is short and the Minister cannot point to any prejudice.
- 25 Secondly and contrary to the Minister’s submissions, it cannot be said that the remaining proposed grounds of appeal lack any reasonable prospects of success. As to ground 1, the primary judge’s reasons are expressed with a high degree of generality, raising an issue as to their adequacy at law. Nor is ground 2 unarguable, but turns upon how the relevant submission made by the appellant to the Tribunal is properly to be understood.

26 Thirdly, while the appellant was present in court when the primary judge gave an *ex tempore* (oral) judgment, he has given a reasonable explanation for the delay. Nor did the Minister suggest otherwise. The late publication of the reasons meant that the appellant had no written statement of reasons on the basis of which to seek legal advice, or to assess, whether or not to institute an appeal and, if so, on what grounds, until after the expiry of the period within which he had a right to appeal. As the Court has elsewhere observed, that is, with respect, an undesirable state of affairs. Written reasons should be published shortly after the giving of *ex tempore* reasons and well within the appeal period. Where that may not occur, however, it should be borne in mind that FCR r 36.03(b) expressly envisages that the court appealed from may make orders deferring the commencement of the period within which an appeal may be instituted: see *CTV15 v Minister for Immigration and Border Protection* [2017] FCA 976 at [12]. It is also open, for example, to a Court to defer the date on which the final order as to costs is made until written reasons are published thereby achieving the same result.

4. DISPOSITION OF THE APPEAL

Ground 2, notice of appeal

27 It was not in issue that a failure to comply with the requirements of procedural fairness is established where the decision-maker fails “*to respond to a substantial, clearly articulated argument relying upon established facts*”: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ). Similarly the Full Court held in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 that:

... if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued the error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if the claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal...

28 Applying these principles, by ground 2 of the draft notice of appeal the appellant alleges that the Tribunal fell into jurisdictional error in failing to consider a submission raised by him as to why the requirements of PIC 4020(1) should be waived under PIC 4020(4). In support of this ground, the appellant relied upon his written submission to the Tribunal provided by email on 22 June 2016 in which he contended that:

... due to the selfish actions of my uncle and the huge miscommunication with my migration agent [who allegedly failed to send documents about alternative funding to

the Department in time], I have lost everything... I have persistently worked throughout all my courses and I have almost reached the end of my student journey. All I ask from immigration is that they do not let the selfish and unjust actions of others jeopardize my life. I pledge that I will always remain a great immigrant if I am given the opportunity to complete my final leg of studying before I return back to my country to use all my skills to make something of myself.

If it is of no possibility for me to obtain this visa, I humbly request immigration to remove the 4020 condition on my visa due to these exceptional circumstances that I have mentioned before you. One of the employers is happy to sponsor me due to my exceptional skills but due to 4020, I am unable to lodge my visa application.

I humbly submit that I am victim of the family enmity I would absolutely love to finish off my studies in Australia but if this is not possible I would like to at least have any negative information against me amended to the truth.

(errors in the original; emphasis added)

- 29 The appellant submitted that in the second paragraph quoted above, he expressly asked the Tribunal to waive the requirements of PIC 4020(1) on the ground that the benefit which his Australian employer would take from his “*exceptional skills*” constituted compelling circumstances affecting an Australian citizen or permanent resident for the purposes of PIC 4020(4). Alternatively, the appellant submitted that this passage from his submissions to the Tribunal squarely raised that claim.
- 30 Notwithstanding the careful submissions by the appellant’s counsel, ground 2 has not been established. It is premised upon a misunderstanding of the relevant passage of the appellant’s written submission to the Tribunal. The request to “*remove the 4020 condition*” is expressed to be “*due to **these** exceptional circumstances that I **have** mentioned before you*” (emphasis added). As such, the submission was referring back to circumstances set out earlier in it, being the uncle’s alleged misconduct and the miscommunication with his migration agent, on the mistaken assumption that such matters could constitute compelling circumstances for the purposes of PIC 4020(4). The reference to the employer being happy to sponsor the appellant is put in the context of the appellant appreciating that a failure to correct the finding that he has not complied with PIC 4020 (i.e. the request that he would like “*at least... any negative information against me amended to the truth*”) will preclude him from lodging a visa application sponsored by his employer for three years.
- 31 It follows that, irrespective of whether ground 2 was fairly raised below and leave would be required to raise the ground, the ground cannot succeed.

Ground 1, notice of appeal

32 Given that ground 2 has not been established, it follows that the complaint that the primary judge failed to give adequate reasons in ground 1 of the appeal must be dismissed. This Court is fully apprised of the judicial review action with which the primary judge was seized. Even assuming that the primary judge's reasons are inadequate, it is apparent that the appellant's judicial review application was correctly dismissed. In that circumstance, there would be no utility in remitting the matter to the Federal Circuit Court.

5. CONCLUSION

33 For the reasons set out above, the application for an extension of time is allowed with respect to grounds 1 and 2 of the draft amended notice of appeal and the appeal is dismissed with costs.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Farrell and Perry.

Associate:

Dated: 23 November 2017